RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

CARLO J. MARINELLO, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner Carlo J. Marinello, II.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

Effective tax enforcement requires uniform, predictable and comprehensible distinctions between lawful business practices and felonies. The College submits this *amicus* brief because it is deeply concerned that the lower courts' unbounded reading of the residual clause in 26 U.S.C. § 7212(a) erases those distinctions and impermissibly shifts the power to define criminal liability to prosecutors. Narrowed appropriately, the residual clause in § 7212(a) has a specialized role to play in combating obstruction of tax enforcement. Read broadly, it threatens principles at the foundation of our system of justice and creates undue risk for both taxpayers and Fellows of the College who have devoted their careers to helping taxpayers navigate the tax laws.

SUMMARY OF ARGUMENT

The Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citation omitted). Desire to ensure fair warning and deference to Congress coincide to point unequivocally in the direction of a narrow reading of the residual clause of § 7212(a).

The unbounded reading of § 7212(a) espoused by the Government and adopted by the court below deprives taxpayers and their advisors of fair notice of the conduct it punishes, and invites arbitrary enforcement by prosecutors empowered with vast discretion. These potential constitutional infirmities militate in favor of a narrow reading of § 7212(a) that recognizes its specialized role in the comprehensive tax enforcement system enacted by Congress and adopts the safeguards that Congress and the courts have developed to ensure due process in prosecutions for tax crimes and obstruction of justice.

Narrowed appropriately, § 7212(a) is a tool to combat interference with an identifiable tax enforcement activity by a defendant who commits an affirmative act to obstruct or impede with knowledge of that activity and intent to gain an advantage he knew to be unlawful. Any broader reading would implicate constitutional principles and eviscerate the

comprehensive tax enforcement system Congress enacted.

ARGUMENT

I. Without a Narrowing Interpretation from this Court, the Residual Clause of § 7212(a) Presents Grave Constitutional Concerns.

The Court recently confirmed that the Government violates the guarantee of due process "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). The unbounded reading of the residual clause espoused by the Government and adopted by the court below has both vices of a vague statute.

A. *The Residual Clause of § 7212(a) Fails to Give Fair Notice of the Conduct it Punishes.*

The residual clause of § 7212(a) makes it a felony to "in any other way corruptly . . . obstruct[ ] or impede[ ], or endeavor[ ] to obstruct or impede, the due administration of this title." The lower courts have defined "corruptly" to mean "with intent to gain an unlawful advantage or benefit either for oneself or another." *See, e.g.*, *United States v. Sorensen*, 801 F.3d 1217, 1224 (10th Cir. 2015); *United States v. Saldana*, 427 F.3d 298, 305 (5th Cir. 2005); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991). Taking false comfort from the "corruptly"

mens rea requirement, the Second Circuit in the decision below refused to limit the scope of § 7212(a) to interference with a pending Internal Revenue Service ("IRS") action of which the defendant was aware, and found that no affirmative act is necessary for this felony. *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016). Read that broadly, § 7212(a) criminalizes *any* act or omission that could potentially make *any* aspect of the IRS's job harder in *any* way as long as the defendant committed the act or omission with an intent to gain an unlawful benefit—whether or not the defendant knew the benefit was unlawful, whether or not the act or omission was itself a lawful act, whether or not the defendant acted deceitfully, whether or not the defendant could foresee any nexus between the act or omission and the IRS, and whether or not the act or omission occurred within the adversarial process.

The Government argues that "unlike justice administered in a court proceeding—which is a defined, discrete event—tax administration is continuous, ubiquitous, and universally known to exist." Resp't's Br. in Opp'n at 9. It is precisely this continuous, ubiquitous, and universal nature of tax administration that renders an unbounded interpretation of the residual clause of § 7212(a) unconstitutionally vague. In administering the tax code, the IRS plays every conceivable role: lawmaker when it promulgates regulations and rulings; administrator when it processes returns and payments; investigator when it conducts civil audits or criminal investigations; settlement officer when the Office of Appeals considers a disagreement between the taxpayer and examiner; litigator when

attorneys in the Office of Chief Counsel represent the IRS in adversarial court proceedings; decision-maker when it rules on Private Letter Ruling requests; and ethics board when it creates rules for practice before the IRS and enforces those rules through its Office of Professional Responsibility. Countless otherwise lawful acts or omissions could impede the IRS in one of its myriad roles. By giving prosecutors the discretion to convert any one of those countless acts or omissions into a federal felony, the residual clause violates the Constitution's prohibition on vague criminal laws.

Tax lawyers, including Fellows of the College, face an especially heightened risk of wrongful prosecution without fair notice under the residual clause of § 7212(a). Tax lawyers owe duties of confidentiality and zealous advocacy to their clients that often compete with an ill-defined duty to the tax system that may morph depending on whether the lawyer is engaged in tax planning, audit defense, litigation or any other type of interaction with the IRS. Defining the duties owed to the IRS in each context, and striking the right balance between those duties and often conflicting duties owed to taxpayer clients, is no easy feat. Indeed, the scope of these duties and appropriate resolution of the inevitable conflicts between them are the subject of significant dispute and consternation.[2] These are

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[2] *See, e.g.*, John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 Fordham L. Rev. 2721, 2725 (2016) (describing the longstanding debate over the tax lawyer's role and arguing that, although the lawyer has a duty to the *(cont'd)*

muddy waters for even the most experienced tax lawyers, and the Second Circuit's reading of § 7212(a) gives prosecutors the unfettered right to decide that a lawyer's attempt to strike the right balance was not only erroneous, but may be charged as felony obstruction. Tax lawyers already forced to sail through Scylla and Charybdis to comply with their ethical obligations should not face the additional threat of felony prosecution on one side of the strait.

Without a narrowing interpretation of § 7212(a), the line between effectively representing a taxpayer and what a prosecutor could charge as corruptly impeding the IRS is nonexistent. For example, when handling an audit, the taxpayer's lawyer may discover that the taxpayer underpaid his tax. In our adversarial system of justice, there is no duty imposed on the lawyer to expose flaws in the taxpayer's returns or recordkeeping during an IRS audit. Indeed, the lawyer is obligated to preserve the confidentiality of information shared by the taxpayer within the attorney-client privilege and to

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system, "concrete guidance" on the scope of that duty is needed); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. Kan. L. Rev. 847, 851 (1999) (recognizing the contested question of how a tax lawyer's duties conflict and arguing that there is no discrete duty by the lawyer to the tax system); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681, 687-88 (1997) (taking the position that when a lawyer's two duties collide, the duty to the system takes priority).

help the taxpayer minimize his exposure for additional tax and criminal or civil penalties to the extent she can do so within her ethical obligations. As interpreted by the Second Circuit, however, § 7212(a) authorizes felony prosecution for an omission that impedes the administration of the tax code if it is committed with intent to gain an unlawful advantage for oneself or another. Is the tax lawyer's failure to notify the IRS of her client's tax deficiency, committed with intent to gain an unlawful advantage for her client in the form of a lower tax liability, a felony under § 7212(a)?

Similarly, what risk might a tax lawyer (or her client) face when the newly retained tax lawyer discovers through a review of the client's financial records and previously filed tax returns that certain items of income were not properly reported on those returns? Treasury regulations counsel that the tax lawyer who knows that her client has not complied with the tax laws, or has made an error or omission in his return, must "advise the client promptly of such noncompliance, error, or omission" and "the consequences . . . of such noncompliance, error, or omission." 31 C.F.R. § 10.21. This Court has held that the tax code does not require the filing of amended returns. *Badaracco v. Commissioner*, 464 U.S. 386, 397 (1984). If the tax lawyer explains the law to her client and the client elects not to amend his returns in the hope that the IRS does not select his returns for examination, can the lawyer or her client be prosecuted under § 7212(a) for such failure to act?

Consider also that tax lawyers handling IRS audits routinely receive requests for an interview of

the taxpayer. Participating in that interview is often not in the taxpayer's best interests, and an effective lawyer would advise the client of the risks of an interview and then attempt to avoid it. Is it a violation of § 7212(a) for the lawyer to stall the auditor and avoid scheduling the interview? Is it a violation of § 7212(a) to schedule the interview, but advise the taxpayer to assert his Fifth Amendment privilege against self-incrimination throughout the interview? Either way, the tax lawyer is impeding the IRS in its effort to administer the tax code, and doing so with the intent to gain an unlawful advantage for her client in the form of a lower tax liability. There is nothing in § 7212(a) to distinguish deceitful dodging from honest stalling, or to differentiate protection of Constitutional privileges from other kinds of stonewalling.

Similar obstruction of the IRS happens routinely in the normal course of litigation between taxpayers and the IRS. Indeed, the central issue in tax litigation is typically whether the taxpayer was entitled to the reduced tax liability he claimed, or whether the reduction was an "unlawful benefit." If, at the conclusion of the litigation, the court finds that the taxpayer's correct tax liability was higher than he reported on his return, is everything the taxpayer and his lawyer did to impede the IRS in its effort to win the case—such as objecting to interrogatories or disputing requests to admit—suddenly a felony in hindsight? Nothing in § 7212(a) carves out actions taken in the course of litigation maintained in good faith.

In addition to the risks of wrongful prosecution arising from adversarial interactions with the IRS,

there are also countless actions or omissions that could trigger a prosecution under § 7212(a) even though the eventual impact on the IRS is both unforeseen and unforeseeable. For example, a small restaurant may store its register tapes and other records in the basement. If, when installing a new freezer, the owner's son runs the electrical wires himself to avoid the cost of hiring a licensed electrician, he will have acted with intent to secure an unlawful benefit for the restaurant in the form of money saved by not complying with the local building code. If a fire caused by the faulty wiring destroys the register tapes and other records, and the IRS subsequently audits the restaurant, the lack of records would impair the IRS's ability to examine the restaurant's income. The restaurant owner's son, therefore, could be prosecuted under the residual clause of § 7212(a) because actions he took with intent to gain an unlawful benefit for the restaurant impeded the administration of the tax code. Although local building codes are certainly important, a failure to comply should not become a federal felony simply because it kicks off a chain of events that makes the IRS's job harder at some point in the future.

As this Court recognized long ago, "[i]t is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 243 (1932) (citations omitted). Under the reading espoused by the Government and adopted by the court below, the residual clause of § 7212(a) is really no rule or standard at all, yet it touches "every

aspect of economic life." *United States v. Reeves*, 752 F.2d 995, 999 (5th Cir. 1985). Such a pervasive yet simultaneously indefinite criminal statute does not pass Constitutional muster.

B. *The Residual Clause of § 7212(a) is So Standardless that it Invites Arbitrary Enforcement.*

In addition to failing to give ordinary people—or even highly educated tax lawyers—fair notice of what conduct is proscribed, the residual clause of § 7212(a) impermissibly shifts the balance of power "between 'the legislature, the prosecutor, and the court in defining criminal liability.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). Like the residual clause in *Johnson*, the residual clause in § 7212(a) "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2258. In *Johnson*, the Court found that "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.* The lower courts have been unable to define any consistent, intelligible boundaries for § 7212(a) and the Government has progressively abandoned all objective standards it previously applied in self-restraint.

1. *Courts have Struggled to Craft Principled and Intelligible Boundaries Around the Residual Clause.*

Although § 7212(a) was enacted with the Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat.

855, the Government refrained from using the residual clause for over twenty-five years. In the first reported appellate decision interpreting the residual clause, the court noted that it could find no other cases brought by the Government and would, therefore, "proceed cautiously where for over twenty-five years the Government has feared to tread." *United States v. Williams*, 644 F.2d 696, 699 (8th Cir. 1981). In *Williams*, the government acknowledged that it had previously asserted that § 7212 applied only to situations involving force or threats of force, but characterized that position as "timid" and sought a more expansive interpretation of the statute. *Id.* at 699 n.12. The court in *Williams* agreed, finding that "the broad language of section 7212's omnibus clause demands a correspondingly broad construction." *Id.* at 700. Since then, the Government's continuing efforts to expand the scope of § 7212(a) have met with some trepidation from the lower courts, but no uniform, predictable, or comprehensible limits on prosecutorial discretion.

The Court of Appeals for the Sixth Circuit has made the most progress toward articulating an intelligible boundary on the scope of § 7212(a). Relying heavily on this Court's interpretation of 18 U.S.C. § 1503 in *United States v. Aguilar*, 515 U.S. 593 (1995), and observing that the residual clause in § 7212(a) contains language virtually identical to § 1503, the Sixth Circuit construed the omnibus clause as requiring proof that a defendant was aware of "some pending IRS action" when he engaged in the potentially impeding conduct. *United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998). The

Kassouf court correctly expressed concern that broader application of § 7212(a) could "open[ ] the statute to legitimate charges of overbreadth and vagueness" and reluctance to construe the statute to impose criminal liability on a defendant who "may have no idea that conduct such as the failing to maintain records (before his tax returns were ever filed) might obstruct IRS action because he had no specific knowledge that the IRS would ever investigate his activities." *Id.* at 958.

The following year, a different panel of the Sixth Circuit held that *Kassouf* should be limited to its precise holding and facts, and that § 7212(a) may apply to defendants who anticipatorily try to impede the administration of the internal revenue laws before the pendency of any IRS proceeding. *United States v. Bowman*, 173 F.3d 595, 600 (6th Cir. 1999). In *Bowman*, the defendant was prosecuted under § 7212(a) after he attempted to prompt an IRS investigation into several of his creditors by filing forms with the IRS that falsely indicated that his creditors had received taxable income. *Id.* at 599. The court opined that "[a]ll of the reasoning in *Kassouf* supports the conclusion that an individual's deliberate filing of false forms with the IRS specifically for the purpose of causing the IRS to initiate action against a taxpayer is encompassed within § 7212(a)'s proscribed conduct," and differentiated the two cases factually on the grounds that "[t]he filing of false tax forms is not legal when undertaken; it is not speculative; it is specifically designed to cause a particular action on the part of the IRS." *Id.* at 600.

Most recently, the Sixth Circuit found that "although *Bowman* purported to limit *Kassouf* to its facts, it would be more accurate to conclude that the opposite is true." *United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014). As explained by the court in *Miner*, *Kassouf* "applies to defendants whose conduct in failing to disclose or in peculiarly structuring their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds," *id.* at 345 (citing *Kassouf*, 144 F.3d at 953), while *Bowman* "is reducible to a rule that a defendant who intentionally attempts to instigate a frivolous IRS proceeding cannot claim to have lacked the necessary intent to impede the IRS's administration of its statutory duties with respect to that proceeding." *Id.* (citing *Bowman*, 173 F.3d at 600). The court found, therefore, that the government erred in characterizing "*Kassouf* as an exception to *Bowman*, rather than the other way around." *Id.* at 344. In an effort to reconcile the two earlier decisions, the *Miner* court noted that "*Bowman*, in rejecting *Kassouf*'s application to a defendant who was attempting to instigate a frivolous IRS proceeding rather than to impede a preexisting one, did so primarily because it believed that the indicia of intent to impede were patently obvious." *Id.*

The state of the law in the Sixth Circuit, therefore, appears to be that the government must prove that the defendant was aware of a specific IRS action at the time of the potentially impeding conduct, unless the intent to impede is "patently obvious." Rules with undefined and inarticulable exceptions are no longer rules, and cannot transform

an unconstitutionally vague criminal law into one that complies with the Due Process Clause.

Moreover, the Sixth Circuit's efforts to define some boundary around § 7212(a) have met with disagreement from every other circuit that has considered the issue. *Marinello*, 839 F.3d 209; *United States v. Sorensen*, 801 F.3d 1217 (10th Cir. 2015); *United States v. Floyd*, 740 F.3d 22 (1st Cir. 2014); *United States v. Massey*, 419 F.3d 1008 (9th Cir. 2005). Refusing to impose any similar boundaries on prosecutions under § 7212(a), the other courts misguidedly rely on the "corruptly" *mens rea* to differentiate lawful conduct from felony obstruction. *Marinello*, 839 F.3d 209, 222 ("[O]ther courts . . . have decided that section 7212(a)'s '*mens rea* requirement' sufficiently 'restricts the omnibus clause's reach. . . .'" (citing *Miner*, 744 F.3d at 347)).

In *United States v. Reeves*, 752 F.2d 995 (5th Cir. 1985), the court noted that it had "upheld section 1503 as not unconstitutional on vagueness grounds largely because the statute covers only actions related to pending judicial proceedings, thus providing adequate notice to potential violators." *Id.* at 999 (citing *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978)). The court recognized, however, that the "narrow circumstances in which section 1503 applies have no parallel in cases involving section 7212(a)" because the IRS "is permitted great power to intrude on, and investigate virtually every aspect of economic life to effect its purpose of administering the tax laws." *Id.* at 999. The court, therefore, sought to provide the notice required for due process by construing the statutorily-undefined "corruptly" *mens rea*. The

court found no cases interpreting the word "corruptly" in § 7212, so it looked to a case construing the term in § 1503 and the legislative history of § 7212 to craft a definition. Drawing on a Senate report that provided one example of what the statute meant by "corruptly endeavor," the court found that the example—corrupt solicitation—was a paradigm of a corrupt endeavor. *Id.* at 1000-01. The court, therefore, defined "'corruptly' endeavoring to impede or obstruct Title 26 as forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another." *Id.* at 1001.

Subsequent decisions adopting this definition shed light on the persisting lack of clarity in § 7212(a). For example, in *United States v. Sorensen*, the defendant used trusts to reduce his taxable assets, and insisted at trial that he did not know that the use of the trusts or the reduction in his tax liability was unlawful. 801 F.3d at 1229-30. The district court refused to give the defendant's requested jury instruction that to find him guilty, the jury must find that he knew the use of the trusts was illegal. *Id.* at 1229. The Tenth Circuit affirmed, finding that it need not decide whether the definition of corruptly requires knowledge of illegality. *Id.* at 1230.

While leaving open the question of whether § 7212(a) requires that the defendant knew that the benefit he sought was unlawful, the courts have found that the defendant need not have committed any unlawful act because "an otherwise lawful act could violate the statute by being carried out for a corrupt purpose or in a corrupt manner." *United States v. Popkin*, 943 F.2d 1535, 1538 (11th Cir.

1991) (affirming conviction of an attorney who formed a domestic corporation). Moreover, the unlawful benefit need not have any relationship to tax administration, or even constitute a financial benefit. *United States v. Giambalvo*, 810 F.3d 1086, 1098 (8th Cir. 2016) (rejecting the argument that "the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage" (quoting *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992))). In other words, a lawful act committed with intent to secure any sort of economic or non-economic benefit that turns out to be unlawful—even if the defendant had no knowledge of illegality—is sufficient for prosecution under § 7212(a) as it has been interpreted by the lower courts.

Finally, in the decision below, the Second Circuit eliminated any vestige of a limitation on the scope of § 7212(a) by not only disavowing the Sixth Circuit's pending action requirement, but by announcing that § 7212(a)—unlike every other tax felony—requires no affirmative act by the defendant. The court acknowledged that "the scope of omissions on which an omnibus clause violation could be based is not limitless," but provided no other guidance about where that line might be drawn. *Marinello*, 839 F.3d at 225 n.15 (citing *United States v. Wood*, 384 F. App'x 698, 708 (10th Cir. 2010)). Instead, the court simply concluded that "[w]hatever those limits may be, the omissions at issue here do not exceed them." *Id.* at 225 n.15.

Prosecutions under the residual clause of § 7212(a) are a morass of uncertainty because the lower courts have failed to articulate any principled,

intelligible, and predictable boundaries on its scope. As in *Johnson*, "the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause." 135 S. Ct. at 2562.

2. *Prosecutors have Abandoned All Objective Standards Limiting Prosecutions Under the Residual Clause.*

After rejecting its previous "timid" interpretation of § 7212(a) in 1981, *Williams*, 644 F.2d at 699, the Government has steadily expanded its interpretation of the residual clause, abandoning all objective criteria it previously used to define when a prosecutor could charge a violation of § 7212(a). In 1989, the Department of Justice Tax Division issued Directive No. 77, which stated:

> In general, the use of the "omnibus" provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed—typically conduct designed to impede or obstruct an audit or criminal tax investigation. . . . However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties.

This policy provided at least some intelligible boundaries: the residual clause of § 7212(a) could be used to charge obstructive conduct after a tax return was filed, which by nature typically involves an audit or investigation, or large-scale obstructive conduct involving liabilities of third parties, which

by nature foreseeably impacts the administration of the tax laws. In both situations, there would be a nexus between the conduct at issue and the due administration of the tax laws that was not wholly speculative.

That directive, however, was superseded in 2004 by Directive No. 129, which instead instructs prosecutors that:

> A § 7212(a) omnibus clause charge is particularly appropriate for corrupt conduct that is intended to impede an IRS audit or investigation. . . .
>
> A § 7212(a) omnibus clause charge can also be authorized in appropriate circumstances to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties.

The notion that the residual clause of § 7212(a) should be reserved for conduct occurring after a tax return has been filed disappeared entirely from the policy in 2004. This policy shift significantly broadened the potential for abuse by individual prosecutors because it opened the door to prosecutions where there was no foreseeable nexus between the defendant's conduct and the administration of the tax laws, and to prosecutions for felony obstruction based on conduct described elsewhere in the code as a misdemeanor.

The Government's continuous expansion of its own reading of § 7212(a) illustrates the difficulty of defining intelligible boundaries around the residual clause and underscores that the Court "cannot

construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010)); *see also United States v. Sun-Diamond Growers*, 526 U.S. 398, 408 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions). Rather, this Court should either give the lower courts the necessary guidance to interpret § 7212(a) uniformly by crafting articulable, objective boundaries around the residual clause, or let Congress fill the void with an appropriately drafted statute.

II. This Court Should Interpret the Residual Clause of § 7212(a) as a Specialized Tool Within the Tax Enforcement System.

If this Court chooses to save the residual clause from constitutional infirmity, principles of statutory interpretation demand a narrow reading of § 7212(a) as a specialized tool within the tax enforcement system. This Court has previously recognized that when a statute's constitutionality is in doubt, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *U.S. Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973); *see also Skilling v. United States*, 561 U.S. 358, 403 (2010). The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-382

(2005) (citing *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), and *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The canon is a "means of giving effect to congressional intent, not of subverting it." *Id.* at 382. In addition, under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court should] choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted).

The Court can honor the rule of lenity and give effect to Congressional intent by recognizing that § 7212(a) is a specialized tool within the comprehensive tax enforcement system designed by Congress and that the safeguards Congress and the courts adopted to ensure due process in prosecutions for tax crimes and obstruction of justice apply equally to § 7212(a).

A. *To Interpret § 7212(a), the Court Must Consider its Role in the Tax Enforcement System.*

In *Yates v. United States*, 135 S. Ct. 1074 (2015), the plurality, concurrence, and dissent all agreed that statutory terms should be interpreted "in their context and with a view to their place in the overall statutory scheme." *Id.* at 1092 (Kagan, J., dissenting) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Members of the Court disagreed about which direction the context pointed in that case, but uniformly embraced the approach of looking to how the provision at issue fit

in the overall statutory scheme. When interpreted in context and with a view to its place in the overall statutory scheme, it is readily apparent that Congress intended § 7212(a) to perform a specific role within the tax enforcement system rather than to serve as a catchall felony for prosecutors to use at their whim.

Interpreting tax crimes by looking at their role in the structure of sanctions imposed by Congress is nothing new. Indeed, when called upon to interpret the felony offense of tax evasion, the Court looked to "its context in the revenue laws." *Spies v. United States*, 317 U.S. 492 (1943). As the Court explained in *Spies:*

> Congress has imposed a variety of sanctions for the protection of the system and the revenues. The relation of the offense of which this petitioner has been convicted to other and lesser revenue offenses appears more clearly from its position in this structure of sanctions.

Id. at 495. The Court described the escalating civil penalties corresponding to different levels of intent, the misdemeanor for willful failure to pay tax when due, and the tax evasion felony at the "climax" of available sanctions. Acknowledging that the "difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define," the Court sought to distinguish them because "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the

same derelictions it had just defined . . . as a misdemeanor." *Id.* at 497.

The *Spies* Court found the distinction between the misdemeanor and the felony in the "affirmative action implied from the term 'attempt', as used in the felony." *Id.* at 498. As explained by the Court:

> We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Id. at 499. The distinction between the tax misdemeanors and felony evasion crafted by the Court in *Spies* remains a core principle at the heart of the tax enforcement system.

The tax enforcement system enacted by Congress and interpreted by the courts creates uniform, predictable, and comprehensible distinctions between lawful conduct, misdemeanors, and felonies. With very few well-defined and limited exceptions for taxpayers in special roles,[3] the tax felonies

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[3] There are two types of willful failures to act that Congress specifically chose to treat as felonies rather than misdemeanors: the willful failure of a withholding agent to collect, account for, and pay over tax, which is a felony under § 7202, and the willful failure of a person *(cont'd)*

require willful commission of an affirmative act. *See* 26 U.S.C. § 7201 (tax evasion), § 7206(1) (filing a fraudulent return), § 7206(2) (aiding and assisting in preparation of a false return). The common failures to act—failure to pay tax, failure to file a return, failure to keep records, and failure to supply information—are all misdemeanors under 26 U.S.C. § 7203. When viewed in context, it becomes apparent that the Government's sweeping interpretation of § 7212(a) would make it an outlier in an otherwise coherent tax enforcement system and subvert Congressional intent.

B. *Tethering the Residual Clause to an Existing Proceeding Prevents it from Subsuming the Other Tax Crimes and Provides the Nexus Required for Intent to Obstruct.*

Given the care that both Congress and the courts have devoted to refining uniform, predictable, and

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engaged in a trade or business to comply with the currency transaction reporting requirements, which is a felony under § 7203. There is also one misdemeanor in the tax code that does not specifically require willfulness, but incorporates knowledge of illegality into the intent standard in a different way. If a person required to collect, account for, and pay over tax fails to do so, and receives a hand-delivered notice of such failure and the requirement to withhold and pay over additional taxes, continued failure to comply constitutes a misdemeanor under § 7215. In each of these situations, the taxpayer subject to enhanced penalties has special duties prescribed by Congress.

comprehensible distinctions between lawful conduct, misdemeanors, and felonies in the tax enforcement system, Congress could not have intended the residual clause of § 7212(a) to abrogate that entire system. On the contrary, § 7212(a) was enacted alongside the other specifically-defined tax crimes and civil penalties in a comprehensive overhaul of the Internal Revenue Code in 1954. Pub. L. No. 83-591, 68A Stat. 855. It is nonsensical to imagine that Congress decided in one breath that willful failure to file tax returns would be a misdemeanor under § 7203, and in the next breath that the same conduct could constitute a felony under § 7212(a).

For § 7212(a) to make any sense at all in the context of the tax enforcement structure, it must be a specialized tool to combat interference with an identifiable enforcement activity as opposed to a catchall felony that prosecutors could charge as an alternative or supplement to every one of the specifically-defined tax crimes. The statute contains two parallel clauses: one that criminalizes interference with an identifiable IRS agent performing her duties, and one that criminalizes interference with an identifiable enforcement action "in any other way." There must be a nexus between the corrupt endeavor undertaken by the defendant and an identifiable enforcement activity of which the defendant was aware.

Interpreting other obstruction statutes, this Court has consistently required a nexus between the defendant's conduct and a particular proceeding. Interpreting the predecessor to § 1503, the Court required the government to prove not just that the defendant's actions hindered law enforcement

generally, but that the defendant intended to hinder a pending judicial proceeding. *Pettibone v. United States*, 148 U.S. 197, 206 (1893). As explained by the Court, "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." *Id.* The Court subsequently clarified that requirement in *United States v. Aguilar*, 515 U.S. 595 (1995), finding that the defendant's "act must have a relationship in time, causation, or logic with the judicial proceedings." *Id.* at 599 (citing *United States v. Wood*, 6 F.3d 692 (10th Cir. 1993); *United States v. Walasek*, 527 F.2d 676, 679 & n.12 (3d Cir. 1975)). As in *Pettibone*, the *Aguilar* court found that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* at 599. *See also Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (requiring a nexus between persuasion to destroy documents and a "particular official proceeding").

To avoid subsuming the specific tax crimes Congress enacted simultaneously with § 7212(a), and to acknowledge that a taxpayer cannot intend to obstruct tax enforcement activity he knows nothing about, it is necessary to interpret the residual clause as applying to a particular enforcement activity of which the defendant had knowledge at the time of the allegedly impeding conduct.[4]

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[4] In *Miner*, the Sixth Circuit attempted to reconcile its prior decisions in *Kassouf* and *Bowman*, noting that the *(cont'd)*

C. *§ 7212(a) Must Require Knowledge of Illegality and an Affirmative Act.*

1. *Requiring Knowledge of Illegality as an Element of a Tax Crime is Necessary to Preserve Due Process.*

This Court has repeatedly recognized that the complexity of the tax laws justifies a departure from the *mens rea* standard that is sufficient for other crimes. In the seminal case of *Cheek v. United States*, 498 U.S. 192 (1991), the Court explained:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. . . .

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defendant in *Bowman* was "attempting to instigate a frivolous IRS proceeding rather than to impede a preexisting one." *United States v. Miner*, 774 F.3d 336, 344 (2014). This effort to attempt to reconcile the decisions would not have been necessary had the *Bowman* court instead considered the proper role of § 7212(a) in the tax enforcement system; the defendant in *Bowman* was convicted of a felony under § 7206(1) for willfully filing false documents with the IRS, so the additional charge under § 7212(a) was not necessary to punish the defendant for the very acts on which the Sixth Circuit upheld that charge.

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

Id. at 199-200 (citing *United States v. Smith*, 5 Wheat. 153, 182 (1820) (Livingston, J., dissenting)); *Barlow v. United States*, 7 Pet. 404, 411 (1833); *Reynolds v. United States*, 98 U.S. 145, 167 (1879); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); and O. Holmes, The Common Law 47-48 (1881)); *see also United States v. Bishop*, 412 U.S. 346, 360-61 (1973) (requiring knowledge of illegality because "[i]n our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law [and] it is not the purpose of the law to penalize frank difference of opinion or innocent errors." (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943))).

The reasons this Court has articulated for reading the term "willfully" to require knowledge of

illegality in the criminal tax context apply equally to the term "corruptly" in § 7212(a). The lower courts have expressed reluctance "to add the word 'willfully' to section 7212(a), where Congress has seen fit to omit it," *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998), but that misses the point. There is no statutory definition of "willfully" or "corruptly" in Title 26. Rather, the understanding that the term "willfully" connotes a voluntary, intentional violation of a known legal duty arose out of this Court's jurisprudence "due to the complexity of the tax laws." *Cheek*, 498 U.S. at 200. There is nothing in § 7212(a) that lessens the complexity of the tax laws or justifies a departure from this Court's long-established precedent that a person can only be guilty of a tax crime if the Government can prove that the law imposed a duty on the defendant *and* the defendant knew of that duty.

As described above, the standard definition of "corruptly" adopted by the lower courts is to "act with the intent to gain an *unlawful* advantage or benefit either for oneself or for another." *United States v. Williamson*, 746 F.3d 987, 990 (10th Cir. 2014). No circuit court has decided whether proof that the advantage or benefit was unlawful is sufficient, or whether the Government must prove that the defendant knew that the advantage or benefit was unlawful. The Court of Appeals for the Tenth Circuit has twice elected to avoid the question of "whether a conviction under § 7212(a) requires that the defendant knew that the advantage or benefit sought was unlawful," *Sorensen*, 801 F.3d 1217, 1229 (10th Cir. 2015) (quoting *Williamson*, 746 F.3d 992), finding instead in *Williamson* that any

error in the jury instruction was not "plain," and in *Sorenson* that the enhanced jury instruction given in that case did incorporate a knowledge of illegality requirement. *Williamson*, 746 F.3d at 991-93; *Sorensen*, 801 F.3d at 1230 (approving instruction that to act corruptly, the defendant must have acted "knowingly and dishonestly, with the specific intent to gain an unlawful advantage or benefit either for oneself or for another by subverting or undermining the due administration of the internal revenue laws."); *see also United States v. Dean*, 487 F.3d 840, 853 (11th Cir. 2007) (noting that the pattern jury instruction for that circuit includes the "knowingly and dishonestly" language in the definition of corruptly); *United States v. Saldana*, 427 F.3d 298, 303 (5th Cir. 2005); *Kelly*, 147 F.3d at 176-77.

As it stands, there is no uniformly applied requirement that the Government prove knowledge of illegality to convict a defendant of a tax felony under § 7212(a) even though knowledge of illegality is required for every other federal tax crime. The College is concerned that lack of uniformity among the lower courts in defining a key element of a federal felony opens the door to abuse of prosecutorial discretion. The College, therefore, implores this Court to recognize that § 7212(a)—like every other tax crime—requires knowledge of illegality.

2. *§ 7212(a) Should Not be an Exception to the Rule that Tax Felonies Require an Affirmative Act.*

Requiring an affirmative act for a violation of § 7212(a) is necessary to provide fair notice of what conduct constitutes a felony. As described above, the *Spies* Court distinguished the tax misdemeanors from felony evasion by finding that use of the word "attempt" in the felony required an affirmative act. *Spies*, 317 U.S. at 498-99. In addition, the Court found that "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the same dereliction it had just defined . . . as a misdemeanor." *Id.* at 497. This Court should follow the lead of the *Spies* Court in finding that use of the word "endeavor" in § 7212(a) requires an affirmative act, and that conduct specifically described as a misdemeanor elsewhere in the Code is not a corrupt endeavor sufficient to support a conviction under § 7212(a).

In the decision below, the Second Circuit found that "an omission may be a means by which a defendant corruptly obstructs or impedes the due administration" of the code under § 7212(a). *United States v. Marinello*, 839 F.2d 209, 225 (2d Cir. 2016). To support that conclusion, it explained that "surely a defendant could be charged under section 7212(a) for knowingly failing to provide the IRS with materials that it requests, or, as in Marinello's case, for failing to document or provide a proper accounting of business income and expenses." Ironically, the court "recognize[d] that the scope of omissions on which an omnibus clause violation

could be based is not limitless," and then cited *United States v. Wood*, 384 F. App'x 698, 708 (10th Cir. 2010), for the suggestion that "it is a 'questionable proposition' that a defendant's mere failure to file tax returns could constitute a violation of the omnibus clause, particularly because the 'willful failure to file tax returns is addressed in a different section of the Internal Revenue Code, 26 U.S.C. § 7203.'" *Marinello*, 839 F.3d at 225 n.15. Congress, however, designated willful failure to "keep any records, or supply any information" to the IRS—the exact conduct the *Marinello* court found could "surely" be charged as a felony under § 7212(a)—a misdemeanor under § 7203.

In *Wood*, the court found that the defendant "made a plausible argument" that there was plain error in the instructions to the jury because: (1) the willful failure to file tax returns is addressed in a different section of the Code, (2) the government "identified no language in the Code suggesting that the same conduct constituting a violation of § 7203 (a misdemeanor) may also constitute a violation of § 7212 (a felony)," and (3) the government provided no authority supporting the theory that "the failure to file under § 7203 can constitute[ ] a 'corrupt[ ] endeavor'" under § 7212. *Id.* (first alteration added). The court in *Wood*, however, did not decide whether an omission covered by § 7203 could constitute an endeavor for purposes of § 7212 because it found, instead, that the defendant was unable to show that the potential error was prejudicial when there was strong evidence that the defendant engaged in the other means of obstruction charged by the government. *Id.* at 709-10.

Marinello's conviction highlights the dangers of allowing prosecutors to charge omissions as felonies under § 7212(a). Marinello was charged and convicted of the misdemeanors he committed. But the jury was instructed that it could also convict him of felony obstruction in violation of § 7212(a) "on the grounds, variously, that Marinello did not keep adequate records; that, having kept them, he destroyed them; or that, having kept and preserved them from destruction, he failed to give them to his accountant." *United States v. Marinello*, 855 F.3d 455, 456 (2d Cir. 2017) (Jacobs, J., dissenting). Congress defined failure to keep records as a misdemeanor, but the court below found that failure alone was sufficient for the jury to convict Marinello of a felony.

Felony obstruction under § 7212(a) should require more than one of the failures to act that Congress categorized as misdemeanors. If Congress's use of the word "attempt" in describing tax evasion is sufficient to require an affirmative act, surely the word "endeavor" in § 7212(a) fulfills the same purpose.

D. *Any Broader Reading of § 7212(a) Threatens to Undermine the Tax Enforcement System.*

Uniformity, predictability, and comprehensibility are important anchors at the foundation of the tax enforcement system. As the Department of Justice has recognized:

> The Government helps to preserve the integrity of this Nation's self-assessment tax system through vigorous and uniform criminal

> enforcement of the internal revenue laws. Criminal prosecutions punish tax law violators and deter other persons who would violate those laws. To achieve maximum deterrence, the Government must pursue broad, balanced, and uniform criminal tax enforcement. Uniformity in tax cases is necessary because tax enforcement potentially affects more individuals than any other area of criminal enforcement. Broad and balanced enforcement is essential to effectively deter persons of varying economic and vocational status, violators in different geographic areas, and different types of tax law violations.

U.S. Dep't of Justice, *Criminal Tax Manual* § 2.00 (2012), https://www.justice.gov/sites/default/files/tax/legacy/2015/03/27/CTM%20Chapter%202.pdf (incorporating U.S. Attorneys' Manual 6-4.010.) Effective tax enforcement relies on deterrence, and deterrence relies on uniform application of comprehensible distinctions between lawful conduct and criminal behavior. A broad reading of the residual clause in § 7212(a) defeats congressional intent by impeding, rather than promoting, deterrence.

The Government's sweeping interpretation of § 7212(a) criminalizes such a vast array of conduct that it makes enforcement purely a matter of prosecutorial whim. By reading out of the statute any requirement that one be aware of an IRS proceeding, or that the taxpayer (or his lawyer) have undertaken a single affirmative act, the decision below allows prosecutors to look back with hindsight to identify any past omission that may have had the

effect of securing an advantage for the taxpayer, and use that omission to extend the criminal net. When prosecutors have such unrestrained authority to make law through their enforcement choices, the inevitable result is at least the perception—if not the reality—of selective, arbitrary prosecution. This arbitrariness lessens the perceived legitimacy of the tax laws, and leads to increased violations rather than compliance. *See* Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. Rev. Online 152 (2015) (arguing that overcriminalization increases the commission of criminal acts because it facilitates the most prevalent and powerful rationalizations used by would-be offenders).

The purpose of criminal tax enforcement is to preserve the integrity of the comprehensive tax system Congress enacted. A broad reading of § 7212(a) thwarts that purpose by impermissibly shifting the power to define criminal liability to prosecutors. That shift not only violates the Due Process clause, but undermines the integrity of the tax enforcement system.

CONCLUSION

For the foregoing reasons, the College respectfully encourages the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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